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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 802

FRANK BUTCHER, ET AL., *Petitioners*

v.

FLORIDA INDUSTRIAL COMMISSION AND NATIONAL AIRLINES, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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Frank Butcher and 306 others[1] pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on February 18, 1970 (*infra*, p. 19a).

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[1] The 306 others are identified by name at R. 257-268.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 231 So. 2d 47 (*infra*, pp. 14a-18a). The decision of the Florida Industrial Commission, Unemployment Compensation Board of Review (*infra*, p. 13a), and the decision of its Senior Appeals Referee which it adopted (*infra*, pp. 1a-12a), are both unreported. Related decisions of the United States Court of Appeals for the Fifth Circuit and of the United States District Court for the Southern District of Florida in *National Airlines* v. *International Association of Machinists and Aerospace Workers* are reported at 416 F.2d 998 (*infra*, pp. 22a-36a), 74 LRRM 283 (*infra*, pp. 47a-53a), and 308 F. Supp. 179 (*infra*, pp. 37a-46a).

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was rendered on January 27, 1970 (*infra*, p. 14a); a petition for rehearing was denied by that court on February 18, 1970 (*infra*, p. 19a); and the final judgment of that court was entered on February 18, 1970 (*infra*, p. 19a). The Supreme Court of Florida denied a petition for a writ of certiorari to review the judgment of the District Court of Appeal on May 26, 1970 (*infra*, p. 20a), and denied a petition for rehearing on June 30, 1970 (*infra*, p. 21a). An order was entered on September 8, 1970 by Mr. Justice Hugo L. Black extending the time for filing a petition for a writ of certiorari to October 9, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a State may deny unemployment compensation to discharged workers because, instead of acquiescing in their discharge by their employer, they and their union seek full reinstatement to their jobs through the exercise of their federal right to invoke judicial relief against their discharge under the Railway Labor Act, to picket their employer in an effort to secure public support for their position, and to submit the just cause of their discharge to arbitration pursuant to the contractual procedure established in accordance with the requirement of the Railway Labor Act.

STATUTES INVOLVED

1. The Florida Unemployment Compensation Law (15 F.S.A. § 443 (1966)) provides in section 443.06(4) that "[a]n individual shall be disqualified for benefits . . . [f]or any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed. . . ."

2. Section 6 of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. § 151, *et. seq.*) provides that:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said

time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

STATEMENT

The question presented by this case pertains to the denial by the State of Florida of unemployment compensation to discharged employees because they and their union sought full reinstatement to their jobs by the exercise of their federal rights. The facts relevant to this question may be stated as follows.

National Airlines, an air carrier based at Miami, Florida, operates at John F. Kennedy Airport at New York, Miami International Airport, and other airports (R. 22-23). National employs a class of workers known as mechanical, stores and related employees, of whom about 200 are at John F. Kennedy Airport and about 1,000 at Miami International Airport (R. 23, 35). Pursuant to the Railway Labor Act, this class of employees is represented in collective bargaining by the International Association of Machinists and Aerospace Workers (the Union), and the terms of their employment were governed by a collective bargaining agreement terminable on December 31, 1968 by giving 60-days written notice of intended changes in advance of that date (R. 23, 131, 231 (pp. 1-2, 53)). On October 31,

1968, National and the Union exchanged notices of the changes each desired in their collective bargaining agreement in accordance with section 6 of the Railway Labor Act (R. 24). The consequence of the exchange of section 6 notices was to invoke the statutory requirement of the Railway Labor Act to maintain the status quo pending exhaustion of the procedures prescribed by the Act for the resolution of a dispute over requested changes in contract terms (R. 23).[2]

For many years before October 30, 1968, National used three mechanics at John F. Kennedy Airport to taxi aircraft from the hangar to the terminal building (R. 28-29). On October 30 National posted a bulletin informing the employees that henceforth two men, not three, would be used to taxi aircraft (R. 28-29, 218). The institution of this change, later found to violate the status quo requirements of the Railway Labor Act (*infra*, p. 24a, n. 1),[3] was promptly protested by the Union on October 31 (R. 30, 131, 219), but the change was continued in effect (R. 31). On January 17, 1969, three men refused to taxi aircraft with the reduced complement, and the Company suspended them on the spot for an indefinite period "pending investigation and determination of the action to be taken in connection with your refusal to taxi aircraft this date" (R. 33-35, 232). At National, "normally, suspension is discharge" (R. 144).

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[2] *Detroit and Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142.

[3] *National Airlines* v. *International Association of Machinists and Aerospace Workers*, 303 F. Supp. 1132, 1134 (S.D. Fla.):

> "... the Court finds that the Section 6 notices were exchanged prior to effective notice of the taxi crew change. Under this circumstance the ... status quo must be adhered to."

In protest against the suspension, the men at John F. Kennedy Airport, followed quickly by the men at Miami International Airport, refused to work (R. 35, 131-132, 133, 148, 163, 177-178, 188, 194, 199-201, 207, 210-211). On January 18, 1969, pending further hearing, the United States District Court for the Southern District of Florida, on National's application, enjoined the work stoppage and, at the Union's instance, ordered the use of three men to taxi aircraft (R. 36-37, 224A). But the employees refused to return to work because the suspensions of the three men still continued in effect (R. 143, 149, 150, 179, 184-185, 190-191, 215). On January 20, the District Court entered a further order requiring the Union to "advise the membership that it is the order of the Court and of the defendant IAM that all men return to work by their next shift, and that individuals who refuse to so report are subject to penalties which could include dismissal by NATIONAL AIRLINES" (R. 225-226, 37-38). On the afternoon of the same day the Union, which did not authorize or ratify the stoppage and was trying "to cool off the people" (R. 221, 222, 73, 132, 134, 137, 151-152, 154, 162, 164-165, 169, 179, 203), sent a telegram to the employees directing them to return to work (R. 38, 227). On the evening of the same day the Company, without prior leave of the District Court (*infra*, p. 35a, n. 7), "officially notified" each employee by telegram "that if you do not return to work at your work station by no later than your next regularly scheduled shift commencing after 1:00 PM EST, January 21, 1969, your employment with National Airlines is terminated and all rights and privileges will be forfeited" (R. 38-39, 228).

About 50 or 60 men returned to work within the deadline set by the Company (R. 42), but the rest refused because the three men who had declined to taxi aircraft with a reduced crew were still suspended (R. 143, 149, 150, 179, 184-185, 190-191, 204, 213-214, 215). On January 22, 1969, subsequent to the expiration of National's return-to-work deadline and the resultant mass discharge of the employees who did not meet it, National wired the three suspended men informing them that the investigation had been completed and that it had been "determined that a suspension of five (5) work days without pay commencing with your suspension on January 17 is an appropriate disciplinary action in your case. Report for duty on your regularly scheduled shift Friday, January 24, 1969" (R. 233, 61-62, 71-72, 81). But National refused to rescind the mass discharge of the men whom it had terminated in accordance with the telegrams to them when they did not return to work within the specified deadline. "Those that did not return by that telegram were terminated. They are no longer employees of National Airlines" (R. 44). The employees were terminated "[c]ommencing with the second shift on January 21st, which is at 3:30 p.m." (R. 49). As National's vice-president in charge of industrial relations reiterated: "They were all terminated unequivocally" (R. 67); "terminations are terminations" (R. 51); "terminated means terminated period" (R. 85); "[w]e terminated these employees and are replacing them" (Tr. 87); "the employees were discharged" and "their termination is a continuing thing . . ." (R. 88).

About January 28, 1969, National sent each of the discharged employees a final pay check and a routine personnel form notifying them formally of their ter-

mination (R. 49-50, 66, 83, 175, 194-195); "the termination was effective with the wire which they received on the 20th upon their failure to return to work on the 21st" (R. 66, 49).[4] National had begun to recruit replacements on January 23 (R. 42-43, 76), and by March 3, 1969, when the hearing before the Florida Unemployment Compensation Appeal Tribunal was held, all but 250 of the jobs had been filled (R. 56-57, 63, 84, 97). At the same time that National had begun to recruit replacements, it had also offered to rehire the discharged employees, at their former rate of pay and with unimpaired pension rights, but only as new employees with no seniority, with loss of accumulated vacation rights and sick leave benefits, and subject to discharge at will within ninety days of rehire as probationary employees (R. 43-45, 51-54, 64, 98). National would rehire the discharged men only for jobs which had not been filled by replacements, and then only as new employees without seniority and other benefits (R. 56, 63-64, 87, 98).

The Union and the men refused to accept the mass discharge of the employees "as being final," or to acquiesce in the rehire of the men as new employees, and undertook to do "everything necessary to bring about their reinstatement" (R. 146, 157-158, 169-170, 188, 191-192, 202, 208-209). To this end the Union took three courses of action. (1) The Union sought judicial relief against the mass discharge claiming that it constituted prohibited recourse to self-help by National in violation of the status quo requirement of the Railway Labor Act (R. 240-241, 173-174). (2) The Union

[4] National deducted from the discharged employees' final pay checks any balance due on notes of those employees held by the Credit Union (R. 83, 111-113). "This is standard . . . with respect to terminated employees" (R.83).

picketed National in order to inform the public of the mass discharge and by that means to gain public support for the reinstatement of the men (R. 158-159). The signs read: "National Airlines unfair and may be unsafe. Skilled mechanics and related employees fired and locked out. Don't fly National" (R. 48). The picketing expressed "the right of every human being to protest" (R. 158). (3) The Union pursuant to the collective bargaining agreement invoked arbitration of "a 'class' grievance on behalf of all terminated employees" claiming that the mass discharge was without "just cause" (R. 236-238, 67, 69, 87, 142, 144, 173).

The quest for judicial relief eventuated in a requirement that National reinstate with back pay all the discharged men whom National had not replaced by January 24, 1969. The United States District Court for the Southern District of Florida, on the Union's application to it, denied any relief against the mass discharge (R. 58, 240-241, *infra*, p. 25a). An appeal was taken to the Court of Appeals for the Fifth Circuit (R. 240-241, 142), and on September 23, 1969, that Court reversed (*infra*, pp. 22a-36a). The Court of Appeals held that, in order to reconcile the carrier's statutory obligation to maintain the status quo unaltered by resort to self-help with the carrier's need to restore service, the balance should be struck at allowing the carrier to replace, but not to discharge, the employees engaged in the unauthorized work stoppage (*infra*, pp. 25a-36a). The Court of Appeals therefore concluded that "the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances" (*infra*, p. 36a). It remanded the case to the District Court with instructions (1) to determine the time when the work stoppage would have

ended and the strikers would have returned to work, (2) to ascertain the number of strikers who had been replaced as of that time, and (3) to order the reinstatement of those strikers who had not been replaced by then (*infra*, pp. 34a-36a). On remand, the District Court found that, (1) but for the mass discharge, the stoppage would have ended on January 24, 1969, with the lifting of the suspension of the three men who had refused to taxi aircraft with a reduced crew (*infra*, pp. 39a, 50a), and that, (2) on January 24, 67 strikers had been replaced by National (*infra*, pp. 39-40a, 51a), but (3) the District Court nevertheless refused to direct the reinstatement of the unreplaced strikers because in its view the mass discharge was essential to restoration of service (*infra*, pp. 40a-44a). A second appeal was taken to the Fifth Circuit, and that court on July 15, 1970, again reversed (*infra*, pp. 47a-53a). It held that (1) the limitation of self-help to replacement had been settled on the previous appeal and redetermination of that issue was beyond the authority of the District Court (*infra*, pp. 47a-50a), (2) the District Court had applied erroneous standards in determining that 67 strikers had been replaced and it should reconsider in accordance with the correct standards whether that or a lesser number of strikers had been replaced (*infra*, pp. 51a-53a), and (3) those strikers determined to be unreplaced "must be reinstated with full benefits including back pay" (*infra*, p. 52a).

Meanwhile, on and after January 22, 1969, the discharged employees stationed at Miami International Airport had applied for unemployment compensation to the Florida Industrial Commission, Unemployment Compensation Division (R. 1, 243). On and after February 3, 1969, the Commission's Claims Examiners

denied the applications on the ground that the claimants' unemployment was due to a labor dispute at National (R. 2-8, 243). An appeal was taken from that denial to the Florida Unemployment Compensation Appeal Tribunal (R. 9-11, 243). On March 6, 1969, after hearing, the Tribunal's Senior Appeals Referee rendered his decision sustaining the disqualification of the claimants for unemployment compensation (R. 251), giving as his reason that "the labor dispute has been in active progress for the period beginning January 17, 1969, to the present time because the labor dispute was never finally settled, terminated, or completely abandoned" (R. 250). On March 14, 1969, an Application for Appeal from the referee's decision was filed with the Unemployment Compensation Board of Review (R. 252-255). The application stated in part that (R. 253-254):

> . . . [I]n an effort to have their discharges determined to be improper or contrary to the status quo provisions of the Railway Labor Act . . . these Claimants-Appellants are merely pursuing their legal rights which are properly provided for and protected for them as employees under the laws of the United States of America. . . .
>
> . . . [T]he Appeals Referee erred by failing to recognize that these Claimants-Appellants are seeking reinstatement through federally created rights . . . (1) the *status quo* provisions of the Railway Labor Act; (2) by requesting arbitration before the System Board of Adjustment; (3) by seeking their reinstatement rights through the Federal Courts of the United States as provided for them under the laws of the United States; and (4) which laws have pre-empted any Florida law interpretation which as applied and interpreted here would render the State law unconstitutional under the Supremacy Clause of the United States Constitu-

> tion by depriving and penalizing each of these individuals for exercising their federally granted rights.

On April 18, 1969, the Board of Review summarily denied leave to appeal and made "the decision of the Appeals Referee the decision of the Board of Review" (R. 270). A petition for certiorari to review the decision of the Florida Industrial Commission, Unemployment Compensation Board of Review, was filed with the District Court of Appeal of Florida, Third District (*infra*, p. 14a). The petition stated that (Pet. 3):

> The Industrial Commission's ruling in its application of the Florida Unemployment Compensation Law violates the supremacy clause of the Federal Constitution in the following particulars: First, it financially penalizes petitioners, as former employees, for pursuing their legal rights under the Railway Labor Act, the law of the land, and in particular their right to maintain the *status quo* pursuant to 45 U.S.C. § 156; secondly, the Industrial Commission failed to consider that the massive discharge of the three hundred seven petitioners constituted a *permanent* discharge and a permanent change of the status quo; thirdly, the congressional and statutory policy of the Railway Labor Act is violated where petitioners for exercising their fundamental rights granted to them by Congress under the Railway Labor Act are financially penalized by the Commission's application of the Florida Unemployment Compensation Law.

The District Court of Appeal denied review, and ruled upon petitioners' federal claims as follows (*infra*, p. 18a):

> The employer invited the petitioners who had been discharged to return to work, subject to tem-

> porary, though not necessarily permanent, loss of seniority and certain other benefits. Through procedures offered under the Railway Labor Act, the petitioners sought to establish the right to return to work without loss of seniority or benefits. They argue that to deprive them of unemployment compensation, while so proceeding, violates their constitutional rights and unlawfully prejudices them for pursuing rights under the federal act. We find these contentions to be unsound because the evidence was sufficient to show, as found by the commission, that their continued absence from work was and remained due to the continuing labor dispute.

A petition for a writ of certiorari was filed with the Supreme Court of Florida, urging that "the Third District's decision directly collides with federal labor policy" (Pet. 5), but that court denied review because "it is without jurisdiction . . ." (*infra*, p. 20a).

REASONS FOR GRANTING THE WRIT

In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, a Florida worker filed an unfair labor practice charge with the National Labor Relations Board against her employer seeking reinstatement and back pay on the ground that her employer had laid her off because of her union activities in violation of the National Labor Relations Act. Florida denied her unemployment compensation for the reason that, by filing the unfair labor practice charge, her "unemployment" became "due to a labor dispute" and she was therefore "disqualified" for benefits by Florida law. This Court invalidated this application of Florida's Unemployment Compensation Law because, as the State's basis for disqualification "has a direct tendency to frustrate the purpose of Congress to leave people free to make

charges of unfair labor practices to the Board," it impermissibly burdens realization of a federal right (*id.* at 239-240).

Florida in this case works the same frustration of national purpose as in *Nash*. In *Nash*, to secure relief against her discharge, the worker invoked the protection of the National Labor Relations Act, the exercise of a federal right. In this case, to secure relief against their discharge, the workers invoked the protection of the Railway Labor Act, participated in picketing, and sought contractual redress, all the exercise of federal rights. In this case, as in *Nash*, Florida used the indicia of the exercise of federal rights to impute "unemployment" to "a labor dispute" and, based on that state characterization of the federally-protected activity, disqualified the workers for benefits. And so, in this case, no less than in *Nash*, nullification of Florida's action is essential in order to preserve the exercise of paramount federal rights from impairment.

1. The question which requires this Court's determination can be put into quick focus. National discharges the workers because they do not discontinue a strike within the deadline it specifies. National thereafter offers to rehire the discharged workers, but only as new employees without seniority and with loss of vacation and sick leave benefits, and then only to such jobs which have not yet been filled by replacements. The workers refuse to submit to this impairment of their job status—no jobs for those who have been replaced and sharply depreciated status for those who accept rehire—but seek full reinstatement by recourse to judicial relief, contractual redress, and picketing. Florida holds that, as the workers persist in their efforts to secure full reinstatement, they are disqualified

for unemployment compensation "because the labor dispute was never finally settled, terminated, or completely abandoned" (*infra*, p. 11a). Accordingly, Florida makes eligibility for unemployment compensation dependent on relinquishment of the quest for reinstatement.

But relinquishment of the quest for reinstatement means surrender of the exercise of federal rights. For each of the means by which the workers sought reinstatement constituted resort to a federal right. (1) Invocation of judicial relief, ultimately obtained, was based on the availability of judicial remedies to realize the protection conferred by the Railway Labor Act against alteration of the status quo pending exhaustion of the statutory procedures for settlement of a dispute over new employment terms. *Detroit and Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142. (2) Picketing to inform the public of the men's side of the dispute and to secure support for it is the exercise of a statutory (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385-386) and constitutional (*Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 313-314) right. (3) Recourse to contractual remedies prescribed by the agreement to resolve the just cause of the discharge is founded on the Railway Labor Act; "the parties were placed under the statutory duty of establishing and utilizing system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes arising under existing contracts." *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682, 686.

Florida thus exacts relinquishment of the exercise of federal rights as the price of unemployment com-

pensation. Workers must either forego unemployment compensation if they choose to exercise their federal rights in seeking reinstatement, or they must forego exercise of their federal rights if they choose to qualify for unemployment compensation. And, for workers without the wherewithal to endure the privation of the loss of immediate income, the drive is towards impalement on that horn of the dilemma which requires giving up federal rights; "[e]ven the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239. Florida thus requires surrender of federal rights in order to qualify for unemployment compensation and heavily weights such choice as there is in favor of surrender. It is just this sort of state hobbling of federal rights that the Supremacy Clause of the Constitution bars. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235; *Sherbert* v. *Verner*, 374 U.S. 398.

2. Florida's interference with the exercise of federal rights is especially apparent and vexatious in this case because National's discharge of the workers did indeed violate the Railway Labor Act. As the Court of Appeals for the Fifth Circuit held, "the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances" (*infra*, p. 36a). The employees were fighting against their victimization by action of their employer made illegal by federal law. Florida thus predicates denial of unemployment compensation on the employees' resistance to violation of federal law. Abridgement of federal rights is therefore doubly implicated. The employer's own action offended federal law, and the employees' response to that illegality was protected by federal law.

3. Florida's application of its Unemployment Compensation Law is also invidious. National defended the mass discharge of the employees on the ground that they participated in "a wildcat strike" and such participation "is misconduct which justifies discharge by the employer" (R. 153, 87-88, *infra*, pp. 29a-30a). National's reliance on misconduct as the basis for its discharge of the employees brought section 443.06(1) of the Florida Unemployment Compensation Law into play. That section provides in part that an "individual shall be disqualified for benefits" for a maximum period of twelve weeks following the week "in which he has been discharged by his employing unit for misconduct connected with his work. . . ."[5] Thus, under Florida law, even when an employee has been discharged for misconduct, the maximum period of disqualification for unemployment compensation is twelve weeks. Nevertheless, in this case, based on the finding that "the labor dispute was never finally settled, terminated, or completely abandoned" (*infra*, p. 11a), the employees despite their discharge for alleged misconduct were disqualified for the entire period that they continued to seek full reinstatement through exercise of their federal rights. This means that, so long as the employees refuse to submit to loss of their jobs to replacements or to a return to work at depreciated jobs

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[5] An individual shall be disqualified for benefits:

(1) For the week in which he has voluntarily left his employment without good cause attributable to his employer or in which he has been discharged by his employing unit for misconduct connected with his work, if so found by the commission, and for not more than the twelve weeks which immediately follow such week, as determined by the commission in each case according to the circumstances in each case or the seriousness of the misconduct. . . .

but instead persist in pursuing their federal rights, they will remain disqualified for unemployment compensation because "the labor dispute was never finally settled, terminated, or completely abandoned." Accordingly, disqualification beyond twelve weeks is based precisely on the employees' exercise of their federal rights, and continues for the entire duration of that exercise. This constitutes invidious discrimination against the exercise of federal rights, for employees discharged for misconduct who do not exercise their federal rights receive unemployment compensation after twelve weeks, while employees who do exercise their federal rights are disqualified beyond twelve weeks and remain disqualified until they relinquish that exercise. It goes without saying that a "state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234.

4. Florida cannot defend its action on the ground that its denial of unemployment compensation was designed to maintain its neutrality in a labor controversy, and maintenance of a neutral stance does not trammel the exercise of federal rights. State neutrality is an impossibility in this situation given a system of unemployment compensation. If Florida withholds compensation, it favors the employer; if Florida grants compensation, it favors the employees. It must therefore willy-nilly favor one or the other side whatever it does. The only true neutrality, therefore, is to make the fact of unemployment as such the element determinative of the grant of compensation, and to treat the underlying labor controversy as irrelevant. And this rationale is required by the supremacy of federal law when disqualification said to be based on mainte-

nance of neutrality in a labor dispute is at bottom interference with the free exercise of federal rights. The impossibility of uncritical acceptance of a plea of neutrality as conclusive is especially evident in this case, for Florida refused in the name of neutrality even to refer the employees discharged by National to available employment elsewhere (R. 215-216)!

This rationale does not implicate the validity of the conventional application of the labor dispute disqualification to deny compensation where unemployment is caused by a strike or lockout called to exert economic pressure in a controversy over contract terms to be incorporated in a collective bargaining agreement. In an economic strike the employees withhold their labor; in an economic lockout the employer withholds labor from his employees; in both the ensuing unemployment is part of the risk which is the inherent, lawful, and protected incident of the economic contest. Denial of unemployment compensation in that contest may therefore be considered consistent with the clash of economic power contemplated by federal law. For a State to decline to soften this clash is in a class apart from unemployment caused by the discharge of employees for which the State declines to grant compensation because the employees refuse to submit and resort to the exercise of their federal rights to secure full reinstatement.

5. This case presents a necessary continuation of the work which this Court began in *Nash*. For too long the portmanteau of "labor dispute" had been allowed to carry whatever disqualification a State chose to impose without regard to its impingement on federal rights. In *Nash* this Court marked one point in a line that a State could not cross. In this case this Court should mark another. Only in this way can a boundary

finally be pricked out which will separate the area of federal paramountcy from state autonomy in the important field of unemployment compensation.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1970

APPENDIX A

Referee's Decision
Docket No. 69-291-U

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL
TALLAHASSEE, FLORIDA

UNEMPLOYMENT COMPENSATION CLAIM

Appeal from Determination of Claims Examiner

In the Matter of:

SOCIAL SECURITY ACCOUNT .

No. 236-05-4529 (Claimant Appellant)

Employer No. —034850

Decision of Appeals Referee

After due notice to the parties, a consolidated hearing was held at Miami, Florida on March 3, 1969. An appearance was made by two hundred fifteen of the three hundred seven claimants involved. With the exception of one individual who testified in his own behalf, all claimants authorized their bargaining agent, International Asssociation of Machinist and Aerospace Workers, to represent their interest. Six witnesses testified in behalf of that labor organization and its membership. The union and its membership were also represented by two attorneys. The employer was represented by his vice president-maintenance, vice president-Industrial Relations, Director of Security and by counsel. A Field Auditor attached to the Miami Unemployment Compensation Tax Office testified as a witness for the Florida Industrial Commission.

ISSUE INVOLVED: Whether claimants' total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which he is or was last employed, within the meaning of Section 443.06(4)(a), Florida Statutes, 1967.

History of Case: Claimants filed their initial or their additional claims for unemployment compensation benefits on and after January 22, 1969. The Claims Examiners made determinations on and after February 3, 1969, disqualifying claimants for benefits because their unemployment was due to a labor dispute in active progress which existed at the premises at which they are or were last employed. The claimants were notified of these disqualifying determinations by mail, dated on or after February 3, 1969. Timely appeals were thereafter filed by all claimants on or after February 4, 1969.

Findings of Fact: Claimants were employed by employer (034850), a certified air carrier of passengers, cargo and mail as mechanics, inspectors, gas truck drivers, stock clerks, cleaners and warehousemen. International Association of Machinist and Aerospace Workers hereinafter referred to as the Union is the duly authorized bargaining agent for all claimants. The terms and conditions of their employment is governed by a collective bargaining agreement entered into between the union and the employer. The agreement under which they last worked became effective August 25, 1966. It was mutually agreed that such agreement would continue in force and effect until December 31, 1968 and would renew its[illegible] without any change until each succeeding December 31 thereafter, unless written notice of intended changes was served in accordance with Section 6 of the Railway Labor Act, as amended, to either party at least sixty (60) days prior to the 31st day of December 1968, or the 31st day of December in any year thereafter.

Prior to June or July 1968, airplanes at Tampa and Jacksonville were being towed from the jetway to the takeoff point by a vehicle known as a "paymover" which was operated by a Union member. Subsequent to the aforementioned period all or a part of the tow operation was performed by members of a different labor organization. The Union objected to this change and filed a grievance.

Such grievance was not disposed, but is still pending disposition.

For many years before October 30, 1968, the employer had utilized the services of three Union members at a New York airport in taxiing aircraft from the hangar to the terminal building. On the last mentioned date, the employer notified the Union that only two of its members would be permitted to perform work of that type in the future. The Union promptly made known its disapproval concerning the change in employment conditions, by means of a telegram dated October 31, 1968. In this instance the employer did nothing other than acknowledge receipt of the wire.

On October 31, 1968, representatives of the employer and the Union met for the purpose of exchanging letters containing proposals for change in the existing collective bargaining agreement. It was the wish of the Union to obtain increased wages, holidays, vacations and sick leave. In addition a proposal was made that over one hundred work rules be changed. The employer, on the other hand, also expressed a desire to change some work rules as well as certain of the existent working conditions. A second meeting was held for a period of five days ending November 18, 1968, at which time representatives of labor and management explained their respective proposals for change. Prior to the conclusion of that conference it was agreed that the hard bargaining processes would begin on December 9, 1968. The parties thereafter met on the date that had been specified. Within a matter of minutes after that meeting began a disagreement arose between the negotiators with respect to the scope provisions of the bargaining agreement, and the Union representative left the bargaining session declaring that negotiations were deadlocked. On December 12, 1968, the employer filed a petition to the National Mediation Board for its mediatory services. It was alleged in that petition that the Union had refused to engage in collective bargaining with respect to contract

amendment negotiations. Although the case was docketed on December 23, 1968, no mediator has been appointed, despite urging on the part of the Union that this be done.

At about 8:00 A.M. on January 17, 1969, an employer supervisor directed two Union members employed at a New York airport to taxi an aircraft from the hanger to the terminal building. When these employees voiced an objection to that assignment, and indicated that they would not taxi the aircraft unless there were three men in the cockpit, the supervisor told them that they were suspended pending investigation. Another Union member was thereafter ordered to taxi the aircraft as a member of a two-man crew. That individual likewise refused to comply, and the supervisor promptly subjected him to suspension also. As soon as other Union members, employed at that employer-operated New York facility became aware that three of their fellow members had been suspended for an indefinite period they expressed their displeasure by resorting to a sit-down strike in which they withheld their services from the employer in concert.

At approximately 9:00 A.M. on January 17, 1969, claimants employed at the employer's main basis of operations in Miami, received information concerning the events that had transpired at New York earlier that day including the aforementioned suspensions and sit-down strike. Immediately following receipt of that information, those claimants who were on duty at that particular time did the same as had been done by the New York Union members in that they also staged a sit-down strike and withheld their services from the employer in concert. Some claimants who were scheduled to work on subsequent shifts, did not report for duty. Others who did make an appearance at the struck premises either remained in the parking lot or refused to render services upon reporting to their respective departments. A number of individuals in the latter category were told by the foreman to go home if they were not going to work, and they went home.

For a period of three days beginning January 17, the employer met with the Union for the purpose of having claimants and other striking employees return to work. Such discussions proved to be futile, as the Union made it clear that its membership would not resume work unless the three New York members were reinstated without suspension and this condition was one that the employer was unwilling to accept.

On January 18, 1969, the employer requested, and was granted a preliminary injunction against the Union by the Federal District Court in which the Union, and any persons acting in concert with the Union were enjoined from striking; the Court also ordered that the Union forthwith restore the status quo. The employer was directed to use a three-man crew to taxi aircraft, pending a hearing and determination by the Court on the matter. A further hearing was held with respect to the injunction order on January 20. In that instance, the Federal Judge ordered that the union direct its members to return to work by their next shift, and that individuals who refused to report would be subject to penalties, including dismissal by the employer. The union thereafter sent telegrams to members on January 20, in which they were advised to return to work for the employer. At approximately 7:30 p.m. on January 20, the employer sent telegrams to claimants and other striking employees which stated, in essence, that if they did not report for work on their next regularly scheduled shift commencing after 1:00 p.m. on January 21, their employment with the employer would be terminated, and their rights and privileges as employees would be forfeited. About 50 to 60 of the 1,000 employees who had struck against the employer on and after January 17, returned to their respective jobs in compliance with the Court order and the telegrams received from labor and management. None of the claimants saw fit to resume work for the employer because, among other things, three of their fellow union members in New York were still under suspen-

sion. On January 22, those employees who continued to withhold their services were denied access to the employer's business premises. At a later date, all employees who ignored the employer's ultimatum to report for duty or be terminated, were mailed routine personnel action forms showing that they had been terminated. Neither the claimants nor the union accepted the notices of termination as being final, nor did they consider that the employer-employee relationship had been severed.

On January 27, the union filed a motion in the Federal District Court for clarification and modification of the preliminary injunction, asking that the union be permitted to engage in peaceful picketing, and also requesting that the employer be required to rescind his termination notices. When the Court denied that motion, the union promptly filed an appeal to the 5th District Court of Appeals at New Orleans, Louisiana. Such appeal has not been disposed, but is pending disposition.

The union and its membership thereafter established picket lines outside of the premises at which claimants last worked, and elsewhere at various points served by the employer. Claimants, in each of the three classes of workers involved herein, have performed picket duty and have rendered other services at the union hall, and at other locations which served to strengthen their position in their dispute with the employer. Individuals who participated in the dispute to this extent have been paid benefits in the amount of $25 weekly since February 11, 1969. The union has chosen to refer to such payments as "lockout benefits." The monies used for the payment of lockout benefits are drawn from Grand Lodge funds by the Union Executive Council. The authority for so doing is found in Article V Section 4 of the Union Constitution which is headed FINANCING STRIKES. Section 4 provides: The E C may draw upon G L funds to finance any strike or lockout.

It is the intent and desire of claimants to resume work for the employer if and when the dispute in which they

are now engaged is settled (on terms that are satisfactory to them). Although each received notice of termination, the employer has never ceased his efforts to prevail upon them to return to their jobs. The employer has been able to recruit some workers to fill positions vacated by claimants; however, none of these newly hired employees have received any assurance from the employer that their services will be utilized on a permanent basis. Since January 17, employment has been, and is now, available for claimants who wish to return to work for the employer. Claimants who did not comply with the employer demand that they report for duty, and who were allegedly terminated, have not been required to forfeit their major rights and privileges as employees of the employer. In that regards, the employer has publicly announced that if they returned they would be reemployed at the previously existing rate of pay and that all pension rights accumulated would be preserved; with respect to other rights (such as extended vacations) they would come in as new employees. As of February 28, approximately two hundred employees had returned to work.

Claimants are unemployed due to a labor dispute in active progress which exists at the premises at which they are or were last employed, within the meaning and purposes of the Florida Unemployment Compensation Law. Each is subject to disqualification for the period beginning January 17, 1969, and until such time that it is shown to the satisfaction of the Commission that their labor dispute with the employer has ceased to exist.

Reasons for Decision: Section 443.06(4), Florida Statutes, 1967, provides that an individual shall be disqualified for benefits for any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory establishment or other premises at which he is or was last employed provided that this subsection shall

not apply if it is shown to the satisfaction of the Commission that:

(a) He is not participating in or financing or directly interested in the labor dispute which is in active progress provided; however, that the payment of regular Union dues shall not be construed as financing a labor dispute within the meaning of this section and

(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises.

The language contained in the subsection of the Law quoted above makes it clear that an individual shall be disqualified for benefits if the Commission finds that three conjunctive conditions exist (1) There is in existence a labor dispute (2) The individual's total or partial unemployment is due to that labor dispute and (3) The labor dispute is in active progress at the premises at which the individual is or was last employed.

The conditions disqualifying a worker for benefits are exceptions to the Law. Exceptions from legislation, humanitarian and remedial in nature, must be narrowly construed giving due regard to the plain meaning of Statutory language and legislative intent. Unfortunately the legislature in this State did not define the term "labor dispute". There is, however, contained in our Law a provision which gives us some indication of its meaning. This is found in Section 443.06(2)(b) which provides:

Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: 1. If the position offered is vacant due to a strike, lockout, or other labor dispute.

Section 185-101 (3) of the Florida Unemployment Compensation Code of Regulations, which pertains to the construction to be given Chapter 443, Florida Statutes, recognizes that certain terms used in that chapter might not be defined. This section of the Regulations states in that regard, "* * * in that event the same shall have their ordinary and generally accepted meaning unless the context clearly indicates otherwise, and except where same may be otherwise defined in a manner not inconsistent with or repugnant to the provisions of the Florida Unemployment Compensation Law.

Prior to the enactment of our Unemployment Compensation Law, the term "labor dispute" had been defined in two acts of the United States Congress. In one act relating to procedure for obtaining injunctions, generally known as the Norris La Guardia Act, and enacted in 1932, U.S.C.A. Title 20, subsection "C" of Section 113, the term is defined as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

In the National Labor Relations Act, U.S.C.A. Title 29, subsection 9 of section 152, enacted in 1935, the following definition is found:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of per-

sons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

We are not bound by the definition of a labor dispute contained in the Federal Statutes, but these definitions are at least persuasive of what should be the definition of such a dispute. They are not out of line with the general and common acceptation of the meaning of the term, and there is no substantial reason to conclude that our legislature had in mind a different meaning to be attached thereto. Accordingly, there would seem to be no impropriety in adopting and applying these definitions to the case at hand.

The record and evidence of the instant case clearly show that during a six to seven month period preceding January 17, 1969, a number of controversies had arisen between the employer and the Union of which claimants are members concerning terms and conditions of employment which had not been settled to their mutual satisfaction. Such controversies included a deadlock that developed with respect to proposed changes in the bargaining agreement and the employer's failure to utilize the services of Union members to the same extent as had been done previously in connection with towing and taxying aircraft. As a result of these labor-management disagreements the fuse was lit for what transpired on the morning of January 17. At that time, the employer suspended three Union members for an indefinite period pending investigation, because they had refused to taxi an aircraft as a member of a two-man crew upon being directed to do so by their supervisor. Immediately thereafter other Union members at the New York facility sat down and refused to work in protest of the suspensions. Approximately one hour later, claimants and their fellow Union members who worked at Miami were notified about the events that had occurred in New York, and it was their decision to withhold their services until the employer reinstated the suspended employees. Since this type of situation clearly constituted a contro-

versy concerning terms and conditions of employment, it follows that a labor dispute commenced in active progress at the premises at which claimants were employed. All claimants became unemployed at the time they elected to remain idle, rather than work. Accordingly, each became unemployed due to the labor dispute. No evidence has been presented in this case to show that any of the claimants should be relieved of the labor dispute disqualification. It is apparent that none can meet the exceptions provided by Law. All claimants participated in the labor dispute by withholding their services from the employer in concert and refusing to work at a time when work was available for them; many, if not all, have further evidenced participation in the dispute by performing picket duty and related services designed to strengthen their position against the employer; each has a direct interest in the outcome of the dispute; all belong to a grade or class of workers of which immediately before the commencement of the dispute there were members employed at the premises at which the labor dispute occurred who have and are participating in the labor dispute and who are directly interested in the dispute. A labor dispute that affects general conditions of employment causes all employees concerned to be "directly interested" in the labor dispute.

The hearing testimony reveals that the labor dispute has been in active progress for the period beginning January 17, 1969, to the present time, because the labor dispute was never finally settled, terminated, or completely abandoned.

Consideration has been given to the contention that claimants are unemployed because they were discharged by the employer, or that their unemployment is due to a lockout. In regards to these allegations, a lockout must in fact be classified as a labor dispute inasmuch as the Florida Statutes associates strikes and lockouts with labor disputes. As has been mentioned previously, any controversy over conditions of employment constitutes a labor dispute, and strikes and lockouts are tactics employed by the Union and the employer respectively in order to resolve the dis-

pute in their favor. The testimony will not support a finding that the employer completely severed the employer-employee relationship with claimants upon advising them they had been terminated. If it was the intention of the employer to permanently dispense with their services, he would not have continued his unceasing efforts to have them return, nor would he agree to pay them their previous salary and preserve their pension rights as a further inducement for them to return to his employ. Issuing letters of discharge and termination notices to striking employees is a tactic that is frequently resorted to by a struck employer as a show of strength. It is, however, meaningless unless the employer has permanently replaced the striking workers and in so doing, removed from them the element of choice or volition as to whether they could have returned to work. Claimants obviously do not consider that they have been discharged as they plan to resume work for the employer when the labor dispute is settled to their satisfaction.

In the light of the considerations set forth above, it should be held that the claimants are unemployed due to a labor dispute in active progress which exists at the premises at which they are or were last employed, and they are properly subject to disqualification for the duration of such dispute.

DECISION: The determination of the Claims Examiner disqualifying claimants for benefits for the period beginning January 17, 1969, and for the duration of the labor dispute which is in active progress at the premises at which they are or were last employed, is hereby affirmed.

The issues involved in this decision were resolved and decided by this Referee while sitting in his office at Miami, Florida, this 6th day of March 1969, A.D.

THOMAS J. DOWDELL, JR.
Thomas J. Dowdell, Jr.
Senior Appeals Referee

Date Mailed to Parties: March 7, 1969

APPENDIX B

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
TALLAHASSEE, FLORIDA 32304

Board of Review Decision No. *

Re: Referee's Decision Docket No. *

In the Matter of:

Social Security Account No. *

Claimant-Appellant

Employer No. 034850

Decision

The Board of Review denies the application of appellant for leave to appeal from the decision of the Appeals Referee shown above.

The denial of this application makes the decision of the Appeals Referee the decision of the Board of Review.

Florida Unemployment Compensation
Board of Review

T. W. Johnston
T. W. Johnston, Chairman

Walter L. Lightsey
Walter L. Lightsey, Member

Frank M. Nelson, Jr.
Frank M. Nelson, Jr., Member

Date Mailed to the
Parties: April 18, 1969

* See Attached List [list omitted]

(Form Fla. Br-6)

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1970

Case No. 69–418

FRANK BUTCHER, *et al., Petitioners,*

v.

FLORIDA INDUSTRIAL COMMISSION and NATIONAL AIRLINES, INC., *Respondents.*

Opinion filed January 27, 1970.

An Appeal from the Florida Industrial Commission.

Manners & Amoon; Richard M. Gale; Plato E. Papps, for petitioners.

James R. Parks; W. W. Stalvey; Jerry B. Crockett, for respondents.

Before CHARLES CARROLL, BARKDULL and HENDRY, JJ.

PER CURIAM.

By petition for certiorari we are asked to review a decision of the Florida Industrial Commission, Employment Compensation Board of Review, upholding a ruling of an appeals referee which in turn approved a ruling of a claims examiner, holding that the claimants were disqualified to receive unemployment compensation under the Florida Employment Compensation Act on the ground that their unemployment was due to a labor dispute in active progress.

The petition for certiorari recited the following facts:

> "(a) These three hundred seven (307) petitioners filed their claims for unemployment compensation benefits on and after January 22, 1969. All petition-

ers were employed as mechanics, gas truck drivers, inspectors, cleaners, stock clerks or warehousemen by National Airlines, Inc., a certified air carrier of passengers, cargo, and mail.

"(b) The claims examiner made determinations disqualifying the petitioners for benefits on the ground that their unemployment was due to a labor dispute in active progress which existed at the employer's premises. Notification of disqualification for unemployment compensation benefits was given to petitioners on or after February 3, 1969.

"(c) Timely appeals were thereafter filed by petitioners on or after February 4, 1969. A consolidated hearing was held before the appeals referee.

"(d) The issue involved as found by the appeals referee was whether claimants' total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which claimants are or were last employed within the meaning of Section 443.06 (4)(a), Florida Statutes.

"(e) The appeals referee made the following findings of fact: (some findings will be challenged by petitioners in their brief as not being supported by competent, substantial evidence). On January 17, 1969, the petitioners employed at the employer plant in Miami received information that three fellow union members employed in a New York airport by the employer had been suspended for refusing to taxi an aircraft with only two men in the cockpit. It was further found that the petitioners on duty at the time of receiving this information staged a sit down strike.

"(f) It was further found the employer filed proceedings in a Federal District Court and was granted a preliminary injunction enjoining the petitioners,

their union and any person acting in concert with the union from striking and the Federal court also ordered that the union restore the status quo. (This preliminary injunction has been appealed and no decision has been rendered to date).

"(g) It was further found that the Federal judge ordered the union to direct its members to return to work on the regular shift on January 20, 1969, and that the union thereafter sent telegrams to its members on January 20, 1969, in which they were advised to return to work for the employer.

"(h) On the same day, January 20, 1969, the employer sent telegrams to the petitioners to the effect that if they did not report to work their employment would be terminated. On January 22, 1969, petitioners' employment was terminated by the unilateral action of the employer.

"(i) The appeals referee also found that 'the employer has never ceased his efforts to prevail upon them [petitioners] to return to their job.'

"(j) The appeals referee held that petitioners were unemployed due to a labor dispute in active progress which existed at the premises at which they are or were last employed, within the meaning and purposes of the Florida Unemployment Compensation Law. He also held: 'Each [petitioner] is subject to disqualification for the period beginning January 17, 1969, and until such time that it is shown to the satisfaction of the Commission that the labor dispute with the employer has ceased to exist.'

"(k) An application for leave to appeal to the Board of Review was timely filed on behalf of all the petitioners. The Board of Review denied the application of petitioners for leave to appeal from the decision of the appeals referee. The Board adopted the

appeals referee's decision as the decision of the Board of Review."

Regarding the foregoing, the petition alleged that the findings of fact ond conclusions of law and decision of the Board of Review were not supported by competent substantial evidence, and that the denial of employment compensation to petitioners unlawfully penalized them for pursuing legal rights accorded them under the Railway Labor Act.

Section 443.06(4), Fla. Stat., F.S.A., provides that one is disqualified for unemployment compensation benefits when the commission finds his total or partial unemployment is "due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed;" (with certain exclusionary provisos which do not appear to be applicable here).

Petitioners argue that because they were discharged by their employer (for refusal to return to work as directed by a federal court order, within a time specified by the employer) the holding that they were unemployed due to a labor dispute was incorrect, and that the employer's termination of their employment (as of January 22, 1969) placed them in a status entitling them to unemployment compensation. Petitioners further argue that the commission's order "violated the supremacy clause, claimants' federal constitutional rights under the fifth and fourteenth amendments and the federal labor policy under the Railway Labor Act."

We reject, as without merit, petitioners' contention that the challenged order was not supported by competent substantial evidence. The petitioners abstained from work in violation or breach of an existing collective bargaining contract made by or on their behalf with the employer, in a strike found by the federal court to be unlawful (and from which they were, in effect, enjoined to desist). That such was due to a labor dispute was established by a showing that it represented a concerted refusal to work,

picketing and the invocation of strike benefits, because of action taken by the employer with respect to certain employees who had refused to comply with a work direction of the employer, the propriety of which they questioned.

The fact that the petitioners, while unemployed due to an existing labor dispute, were discharged by their employer for failure to resume work as directed by court order, would not operate to entitle them to unemployment compensation. See § 443.06(1).

The employer invited the petitioners who had been discharged to return to work, subject to temporary, though not necessarily permanent, loss of seniority and certain other benefits. Through procedures offered under the Railway Labor Act, the petitioners sought to establish the right to return to work with no loss of seniority or benefits. They argue that to deprive them of unemployment compensation, while so proceeding, violates their constitutional rights and unlawfully prejudices them for pursuing rights under the federal act. We find those contentions to be unsound because the evidence was sufficient to show, as found by the commission, that their continued absence from work was and remained due to the continuing labor dispute.

No reversible error having been shown, certiorari is denied and the petition is dismissed.

It is so ordered.

APPENDIX D

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1970

WEDNESDAY, FEBRUARY 18, 1970

Case No. 69-418

FRANK BUTCHER, ET AL., *Petitioners*,

v.

FLORIDA INDUSTRIAL COMMISSION and NATIONAL AIRLINES, INC., *Respondents*.

Counsel for petitioners having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER

Clerk District Court of Appeal, Third District

cc: RICHARD M. GALE
JAMES R. PARKS
JERRY B. CROCKETT
MANNERS & AMOON
PLATO E. PAPPS
W. W. STALVEY
/h

(THE FINAL ORDER IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE FLORIDA INDUSTRIAL COMM. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

APPENDIX E

IN THE
SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1970

TUESDAY, MAY 26, 1970

Case No. 39,513

DISTRICT COURT OF APPEAL, THIRD DISTRICT

FRANK BUTCHER, ET AL., *Petitioners*,

v.

FLORIDA INDUSTRIAL COMMISSION and NATIONAL AIRLINES, INC., *Respondents*.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

cc: Hon. W. P. Carter, Clerk
Hon. T. W. Johnston, Chairman
Hon. Richard M. Gale
Hon. Plato E. Papps
Hon. Bernard Dunau
Messrs. Manners and Amoon
Hon. Jerry B. Crockett
Hon. J. Franklin Garner
Hon. Patrick H. Mears
Hon. T. W. Johnston, Chairman

A True Copy
TEST:
SID J. WHITE
Clerk Supreme Court.

APPENDIX F

IN THE
SUPREME COURT OF FLORIDA

JANUARY TERM A. D. 1970

TUESDAY, JUNE 30, A. D. 1970

FRANK BUTCHER, ET AL, *Petitioners,*

—V.

FLORIDA INDUSTRIAL COMMISSION, ET AL, *Respondents*

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A True Copy,
Test:
SID J. WHITE
Clerk Supreme Court

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF MAY 26, A.D. 1970, IN THE ABOVE CAUSE)

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27312

NATIONAL AIRLINES, INCORPORATED, *Plaintiff-Appellee,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of Florida

(September 23, 1969)

Before BELL and THORNBERRY, Circuit Judges, and CHOATE, District Judge.

THORNBERRY, Circuit Judge: This case concerns the *status quo* or "freeze" provisions of the Railway Labor Act applicable to major disputes. It arises out of a wildcat strike by the carrier's employees while the orderly processes provided by the Act were running their course. The question is whether the carrier, under the unusual circumstances of this case, violated the status quo by discharging strikers who refused to return to work under court order. The district court held that it did not, and, accordingly, that the employees were not entitled to reinstatement. We REVERSE and REMAND.

On October 31, 1968, National Airlines and the International Association of Machinists and Aerospace Workers, AFL-CIO (Union) exchanged § 6 notices of desired changes in their collective bargaining agreement. The parties thereby invoked the elaborate procedures set forth by the Railway Labor Act for the resolution of major disputes, which the Supreme Court has recently outlined as follows:

> . . . A party desiring to effect a change of rates of pay, rules, or working conditions must give advance

written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. *While the dispute is working its way through these states, neither party may unilaterally alter the status quo.* §§ 2 Seventh, 5 First, 6, 10 (Emphasis added)

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 1969, 89 S.Ct. 1109, 1115. Conferences between the parties failed to resolve the dispute over the suggested changes, and several matters were referred to the National Mediation Board in December, 1968. All events giving rise to this suit occurred after the procedures of the Act had been set in motion, but before their completion.

Against this background, National suspended three men on Friday, January 17, 1969, at Kennedy Airport for refusing to taxi an aircraft. The action of the men in question was in response to a controversial order issued by the carrier reducing the number of men needed to taxi an aircraft from three to two. The men apparently determined that the reduction created an unsafe condition. Almost immediately after the suspension, members of the Union sat down on the job at National's Kennedy Airport and Miami International facilities.

Later that same afternoon, National filed a suit in the court below seeking injunctive relief against the Union

alleging that the Union had violated the status quo requirements of the Act and had breached the collective bargaining contract by participating in a strike or sit down. At an emergency hearing the next morning, January 18, 1969, a representative of the Union testified that the strike was an "unauthorized work stoppage or a sit down." The attorney for the Union stated that "we are having a difficult time getting them [the strikers] back," and conceded that a preliminary injunction enjoining the strike was appropriate. The court entered a preliminary injunction ordering the Union to restore the *status quo* by ending the work stoppage. In addition, the Union sought and obtained a temporary restraining order requiring National to employ three men to taxi aircraft.[1]

Although National complied with the court's order on the taxi dispute, the Union's attempts to return the men to work were unsuccessful, and the strike continued. On January 20, the fourth day of the strike, the airline scheduled a second hearing before the district court, seeking further relief to compel compliance with the injunction. As a result of the strike, the airline had already cancelled approximately 36 flights. Representatives of the Union asserted that the employees disregarded the Union's orders to return to work and that the Union had lost control of its members. The first injunction issued by the court had proved ineffective. Accordingly, the district court entered a second order at 12:30 P.M. on the same day, ordering the defendants to "advise the membership that it is the order of the Court and of the defendant IAM that all men return to work by their next shift, and that

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[1] Since the filing of this appeal, the district court has sustained the Union's position on the taxi dispute, holding that National violated the *status quo* by changing the number of men required to taxi an aircraft after the procedures of the Act were set in motion by the § 6 notices on October 31, 1968. The court changed the temporary restraining order into a preliminary injunction directing National to taxi with at least three men until the procedures of the Act are exhausted.

individuals who refuse to so report are subject to penalties *which could include dismissal by NATIONAL AIRLINES.*" (Emphasis added). At 3:41 P.M. that afternoon, the Union sent out 993 telegrams advising its members of the court's second order. Shortly thereafter, at approximately 7:00 P.M. that evening, National notified the strikers that they would be terminated if they did not report for duty at their next regularly scheduled shifts starting at 3:30 P.M. the next day, January 21.

When the strikers did not return to work the next day at the 3:30 P.M. shift, National sent termination notices to approximately 940 IAMAW workers. The Union promptly filed a motion to dissolve the orders enjoining and restraining the strike and, in addition, an "Application for Rule to Show Cause and Preliminary Injunction," seeking to require the reinstatement of all discharged employees. The district court denied the motion and application, and the Union appeals.

The Union's position is that the discharge of the striking employees violated the *status quo* or "freeze" provisions of the Railway Labor Act, and that the discharged employees are therefore entitled to reinstatement. The applicable provision of the Railway Labor Act is Section 6, 45 U.S.C. § 156, which provides in relevant part:

> In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party . . . *rates of pay, rules, or working conditions shall not be altered by the carrier* until the controversy has been finally acted upon, as required by section 155 of this title. . . . [Emphasis added].

"The purpose of § 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted." *Manning* v. *American Airlines, Inc.*, 2d Cir. 1964, 329 F.2d 32, 35. "[T]he legislative history

of the statute shows the 'freeze' provisions were intended to enforce a 'cooling off' period upon both labor and management. . . ." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 2d Cir. 1962, 307 F.2d 21, 45, n. 11 (dissenting opinion). Consequently, where a dispute is working its way through the processes provided by the Act, "neither party may unilaterally alter the *status quo*," *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 1969, 89 S.Ct. 1109, 1115; and "no self-help is permitted." *Brotherhood of Railroad Trainmen* v. *Akron & B.B.R. Co.*, D.C. Cir. 1967, 385 F.2d 581, 597. "[T]he parties may not . . . have resort to either the strike or the lockout before the procedures provided by the Act have been exhausted and a strike or lockout during that period is illegal and forbidden by the Act." *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, S.D.N.Y. 1958, 169 F.Supp. 777, 789.

National argues that the *status quo* provisions of the Act are inapposite here because the change in the taxi crews constitutes only a "minor" dispute.[2] National points out that the men struck over the suspension of the three employees in New York who were suspended because they disputed the work change in the taxi crews at JFK by refusing an assignment to taxi an aircraft. Inasmuch as this minor dispute ultimately led to the discharge of the strikers, the argument continues, the *status quo* provisions of the Act, applicable only to major disputes, cannot be invoked to compel reinstatement. But it is undisputed that the "major dispute" procedures of the Act were brought into play by the exchange of § 6 notices on October 31, 1968 and that those procedures had not been exhausted on January 21, 1969 when the strikers were discharged. Consequently, the discharge occurred

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[2] *See Elgin, Joilet and Eastern R. Co.* v. *Burley*, 1945, 325 U.S. 711, 722-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886; *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 8th Cir. 1963, 322 F.2d 793, 795 on the distinction between major and minor disputes.

during a "freeze" period when self-help is ordinarily unlawful. This would be true even if (and we need not decide the issue) the change in the taxi crews constituted a minor dispute. Plainly a carrier may not, under the guise of resolving a minor dispute, circumvent and defeat the statutory proscription on self-help while a major dispute is running its course. *Cf. Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.*, 1966, 384 U.S. 238, 247, 86 S.Ct. 1420, 1425, 16 L.Ed.2d 501. The statutory ban on self-help is apposite: The question is whether this change violated the *status quo*.

The Union maintains that the discharge of the striking employees constitutes a permanent change in the *status quo*, thereby truncating the purpose of the Railway Labor Act. It argues that the district court abused its discretion and departed from its limited role as guardian of the *status quo* by including a provision in the January 20 order that strikers who refused to return to work "are subject to penalties which could include dismissal by NATIONAL AIRLINES." The Union stresses the impropriety and inflammatory effect of National's January 20 notice to the strikers that they would be discharged if they failed to return to work the next day. It emphasizes that the Union, not the carrier, was ordered to notify the strikers of the court's order. This "anticipatory discharge" or "constructive lockout" was thus a breach of National's obligation under the Act. Moreover, the Union further argues, the exercise of self-help by the strikers did not automatically create a right of self-help for the carrier. When the employees failed to return to work on January 21 under the second order of the court, the carrier was not thereby relieved of its obligation to maintain the *status quo*. Instead of resorting to self-help by terminating the strikers, National should have sought further aid from the district court. Consequently, the discharged strikers are entitled to reinstatement.

Weighing against the Union's claim, however, is the undisputed illegality of the strike. A strike called before

completion of the major dispute procedures, like a change made by the carrier, is unlawful and may be enjoined pending compliance with the Act. *Missouri-Illinois R. Co.* v. *Order of Ry. Conductors,* 8 Cir. 1963, 322 F.2d 793, 796; *American Airlines, Inc.* v. *Airlines Pilots Ass'n,* S.D.N.Y. 1958, 169 F. Supp. 777, 787. It seems established that "the Union may strike only if it has complied with the Act." *United Industrial Workers of the Seafarers Int'l Union of North America* v. *Board of Trustees of Galveston Wharves,* 5th Cir. 1968, 400 F.2d 320, 334; *see* Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes,* 60 COLUM. L. REV. 381, 388, 390.[3] The Union here has consistently maintained that the strike was unlawful, and with the exception of its objection to the language pertaining to discharge contained in the second order issued by the court, concedes the propriety of in-

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[3] The *status quo* provisions of the Railway Labor Act refer to the "representatives of the employees," § 6, or the "parties to the controversy," § 10, so that it is conceivable that only Union-sponsored strikes violate the Act. Such a literal analysis has not been applied, however, in construing other aspects of the Railway Labor Act, *see, e.g., Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.,* 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 618, and it would hardly serve the purpose of the Act to hold that wildcat strikes, such as the strike involved here, did not come within the statutory ban on self-help. Moreover, it should be noted that § 2 of the Act provides that "it shall be the duty of . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . ."

In this connection, consider: "On February 17, 1961 the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs." *Flight Engineers* v. *Western Air Lines,* S.D. Cal., April 14, 1961, 48 LRRM 2487; *see also Wes Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Board,* D.C. Cir. 1962, 314 F.2d 234, 237.

junctive relief to end the strike.[4] National takes the position that an employer may, without more, lawfully discharge employees engaged in an unlawful or a wildcat strike and that the strikers therefore are not entitled to reinstatement. This position finds substantial support in decisions entered in analogous situations under the National Labor Relations Act. It is generally held that, under the NLRA, an employer may lawfully discharge employees who en-

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[4] We take the case as we find it. The illegality of National's conduct with regard to the taxi dispute, see note 1, *supra,* was not advanced as a basis for denying an injunction against the strike. We therefore do not consider whether the equitable doctrine of "unclean hands," *see Florida East Coast Ry. Co.* v. *Brotherhood of Locomotive Engineers,* 5th Cir. 1966, 362 F.2d 482, 485, or the statutory enactment of that doctrine embodied in § 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, *see Butte, Anaconda & Pac. Ry. Co.* v. *Brotherhood of Locomotive Firemen,* 9th Cir. 1959, 268 F.2d 54, 60, *cert. denied* 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104, could have barred National's request for a strike injunction.

In this connection, consider the following:

> "This was at a time when the Carrier itself was in violation of the Railway Labor Act. The cases suggest that at that time, under the Act, the Union had the right to strike; that right continues until the Act is complied with by the Carrier, and thereafter ceases during and until exhaustion of the procedures set up by the Act . . . . If the Carrier refuses to follow the procedures of the Act . . . the Union may strike."

United Industrial Workers of the Seafarers Int'l Union of North America v. *Board of Trustees of Galveston Wharves,* 5th Cir. 1968, 400 F.2d 320, 332-334. Under this rationale, it is conceivable that the strike at the time of the first hearing was lawful. The Union, however, did not contest the initial strike injunction. In any event, the Carrier promptly complied with the January 18 temporary restraining order, issued contemporaneously with the strike injunction, and was thereafter in compliance with the Act. The strike, however, continued and was, therefore, even under the *Galveston Wharves* rationale, in violation of the Act and properly enjoinable from that point forward, if not before. Thus there would have been no bar to the issuance of the second injunction issued on January 20.

gage in "unprotected" conduct or conduct directly violative of the Act and that the discharged employees may not invoke the Act to compel reinstatement by the employer.[5] It is reasoned that "in the absence of the statute, there was nothing in the law which forbade the discharge of strikers. There is nothing in the statute, properly construed, which protects from discharge those who strike in defiance of its provisions." *N.L.R.B.* v. *Draper Corp.*, 4th Cir. 1944, 145 F.2d 199, 205. "The conduct thus protected is lawful conduct." *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, *supra*, 306 U.S. 255, 59 S.Ct. at 476. These principles, developed under the NLRB, National argues, are apposite here and justify the termination of the strikers.

Although the NLRB has been referred to for assistance in construing the Railway Labor Act, *see e. g.*, *Steele* v. *Louisville & N. R. Co.*, 1944, 323 U. S. 192, 200-01, 65 S.Ct. 226, 231, 89 L.Ed. 173, we heed the Supreme Court's admonition that the former "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, 89 S.Ct. at 1118.[6]

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[5] *E.g.*, *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627; *National Packing Co.* v. *N.L.R.B.*, 10th Cir. 1965, 352 F.2d 482, 485 (unlawful picketing); *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805* v. *N.L.R.B.*, 2d Cir. 1963, 312 F.2d 108, 112 (unlawful wildcat strike); *N.L.R.B.* v. *Marshall Car Wheel and Foundry Co.*, 5th Cir. 1955, 218 F.2d 409, 413 (unprotected strike); *Ohio Ferro-Alloys Corp.* v. *N.L.R.B.*, 6th Cir. 1954, 213 F.2d 646, 651.

[6] "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act . . . ." *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 1957, 353 U.S. 30, 31, 77 S.Ct. 635, 636, 1 L.Ed.2d 622, n.2.

Judge Wisdom succinctly stated the relevant differences:

> [T]he Railway Labor Act is more concerned with *continuance of the employer's operations and the employer-employee relationship*. This is evidenced by the fact that while bargaining is the first and last step under the NLRB, it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved. (Emphasis added)

United Industrial Workers of the Seafarers Int'l Union of North America v. *Board of Trustees of Galveston Wharves*, 5th Cir. 1968, 400 F.2d 320, 329-330. National's position fails to take into account the Railway Labor Act's explicit ban on self-help during the "freeze" imposed while the procedures of the Act run their course, a factor not present in the scheme established by the National Labor Relations Act. Self-help by the employees, as the Union correctly argues, does not automatically justify self-help by the carrier. "[R]esort to the courts is preferable to this kind of self-help . . . the 'cooling-off' policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 2d Cir. 1962, 307 F.2d 21, 45 (Marshall, J., dissenting). To allow the carrier to discharge all employees who strike in violation of the Railway Labor Act could undermine the Act's emphasis on "the continuance of the employer's operations and the employer-employee relationship." *United Industrial Workers of the Seafarer's Int'l Union of North America* v. *Board of Trustees of Galveston Wharves*, *supra*. Under such a construction the carrier might be tempted to precipitate an unlawful strike in order to justify a massive discharge. *Cf. Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.*, *supra*, 384 U.S. at 247, 86 S.Ct. at 1425. We do not believe, therefore, that the illegality of the strike

either relieved National of its duty to maintain the *status quo* or justified the discharge of the strikers.

Nonetheless, we hold that under the circumstances of this case, the resort to self-help by the carrier was not altogether prohibited by the Act. The strike, prompted by the suspensions of the three workers in New York, was spontaneous and unauthorized. Representatives of the Union stated at the first hearing that they were having difficulty returning the men to work. The first injunction, directing the Union to restore the *status quo* by ending the strike, proved ineffective. The strikers disregarded orders of their Union to return to work, and the carrier was already faced with the disruption of service at the time of the second hearing. At this point, it was apparent that the Union had lost control over the strikers. Contempt citations directed against the Union or its representatives, therefore, were less likely to end the strike.

In short, an unmanageable work stoppage had occurred and repeated attempts by the court, the carrier and the Union had failed to restore the *status quo* when the carrier resorted to self help. Restoration of the *status quo* had been frustrated by a seemingly unmanageable strike. When viewed in this context, we cannot agree that the resort to self-help by the carrier would vitiate the *status quo* or subvert the orderly processes of the Act. A different case would be presented if there had appeared any substantial likelihood that the strike could have been brought to a prompt end by further court proceedings. But the resort to the courts having proven ineffective, the carrier was permitted to resort to self-help in order to operate its business. It has been held in other contexts that strike conditions may alter the carrier's statutory obligations to maintain agreements and preserve the *status quo*. Thus a carrier faced with a lawful strike over issues which have been carried through the procedures of the Act to an impasse may lawfully depart from other terms of the collective bargaining agreement without following the pro-

cedures of the Act, to the extent "reasonably necessary" to continue its operations. *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.*, 1965, 384 U.S. 238, 248, 86 S.Ct. 1420, 1425; *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO*, 5th Cir. 1964, 336 F.2d 172, 182. The same principle is apposite here.

But the carrier's right to resort to self-help was not unlimited. Again, the principles developed in the *Florida East Coast* cases, *supra*, are applicable here. In those cases the courts defined the extent to which a carrier faced with a lawful strike is free to institute changes without complying with the procedures provided in § 6. The carrier's right to self-help, though explicitly recognized, was carefully circumscribed. The Supreme Court stated that "the justification for permitting the carrier to depart from the terms of the collective bargaining agreement *lies in its duty to continue to serve the public.*" *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.*, *supra*, 384 U.S. at 247, 86 S.Ct. at 1425, 16 L.Ed.2d 501, n.8. (Emphasis added). Consequently, "while the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored." *Id.* at 384 U.S. at 247, 86 S.Ct. at 1425. As Judge Brown stated for this Court:

> "[I]n order for the District Judge to allow FEC to escape the ban on institution of changes pending exhaustion of the statutory procedures recognized by the decisions, he must be convinced that in order to make a meaningful reality of FEC's right to continue to operate, the changes are reasonably necessary.

Florida East Coast Ry. Co. v. *Brotherhood of Railroad Trainmen, AFL-CIO*, 5th Cir. 1964, 336 F.2d 172, 182. We recognize that the courts were there dealing with the car-

rier's right to make necessary changes in response to a *lawful* strike whereas the present case involves the carrier's response to an *unlawful* strike. Thus it could be argued that the carrier's right to self-help is greater here. But the Act's primary emphasis on "the continuance of the employer's operations and the employer-employee relationship," *United Industrial Workers of the Seafarer's Int'l Union of North America* v. *Board of Trustees of Galveston Wharves*, *supra*, is the same in either context and the resort to self-help by either side ought to be carefully circumscribed in both. We therefore hold that the carrier's resort to self-help was justified only to the extent necessary to restore service, its exercise was allowable only in so far as it served that end.

We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. We recognize that the district court was faced with a difficult situation and had little time to deal with it. It is plain that the court's central concern was the restoration of the *status quo*. Nevertheless, we hold that the discharge of the strikers constituted an impermissible form of self-help. The discharge of the strikers was not necessary in order to hire a new labor force. Under both the NLRA and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. *E.g.*, *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381; *Flight Engineers' Int'l Ass'n* v. *Eastern Air Lines, Inc.*, S.D.N.Y. 1962, 205 F. Supp. 182, 194, *aff'd* 307 F.2d 510. The hiring of replacements for the strikers would have been consistent with the attempt to restore service. The discharge of those best suited to carry on the carrier's business, on the other hand, would seem self-defeating: It prevented the possible restoration of the *status quo* should some or all of the strikers choose to return to work before enough replacements were hired. In this connection, we note that immediately after the discharge of the strikers, National notified the three men whose suspension had

triggered the strike that they would be allowed to return to work on Friday, January 24, 1969, three days after the discharge of the strikers. It is possible that the strikers would have returned to work on Friday, January 24, when the three disciplined employees returned to work. The carrier's discharge of the strikers, therefore, may have foreclosed any opportunity to end the strike and restore the *status quo*.[7]

We think "it falls to the lot of the District Judge to pass on what changes were in fact necessary for [National] to continue to operate." *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, AFL-CIO*, *supra*, 336 F.2d at 182. As indicated, replacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand of the point in time when the strikers would have returned to work, *e.g.*, the date the three suspended employees in New York returned to work. The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been re-

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[7] Additionally, we think National acted too hastily when it determined to discharge the strikers rather than returning to the district court for further advice. The court's order indicated only that the failure to return to work "could" subject the strikers to dismissal by National, not that it would do so. The primary responsibility for ending the strike rested in the district court: It was the court's responsibility and prerogative, not the carrier's, to compel compliance with the court orders. Before resorting to self-help, National should have sought authority from the court.

placed at that time, as revealed by company records, are entitled to reinstatement.

In summary, we hold that the exercise of self-help by the carrier was not altogether barred by the Act. The holding is limited to the facts of this case. We emphasize: The unauthorized, or wildcat, nature of the strike; the repeated refusal of the strikers to restore the *status quo* in violation of the Act; the interruption of commerce; the professed absence of control by the Union over the strikers, thus diminishing the efficacy of fines or other contempt measures directed at the Union or its representatives; and the proven inability of the carrier, the Union, and the district court to return the strikers to work. We further hold, however, that the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances. National was entitled only to hire replacements for the strikers in order to operate its airline. The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self-help, as defined here, and determine the right of the strikers to reinstatement accordingly.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 69-83-Civ-CA

NATIONAL AIRLINES, INC., *Plaintiff*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*, *Defendants*

Filed: January 12, 1970

Order on Mandate

This is a formal order entered in accordance with my oral ruling of December 23, 1969. That ruling was made pursuant to the opinion and mandate of the Fifth Circuit Court of Appeals entered September 23, 1969, and October 15, 1969, respectively (Docket No. 27312). The appellate decision reviewed and reversed action taken by this Court on January 24, 1969, in refusing to issue an injunction requiring National Airlines (hereinafter National) to reinstate illegally striking members of the International Association of Machinists and Aerospace Workers (hereinafter the Union) which the airline had discharged. The discharge was effected by a telegram sent by National on January 20 stating that the strikers would be terminated if they did not report back to work at their next scheduled shift beginning at 3:30 p.m. on January 21. The telegram was sent on the heels of the second injunction issued by this Court ordering the strikers to return to work. Neither the injunctions nor the telegram was effective. Further repetition of the facts seems unnecessary. They are unfortunately familiar to the many parties in this tragic labor dispute. For the sake of clarity the factual background of this case is set forth in the appellate opinion, *National Airlines, Inc.* v. *International Association of Ma-*

chinists and Aerospace Workers, et al., 416 F. 2d 1098 at 1099-1101 and is herein incorporated by reference.

The duty given this Court on remand is succinctly expressed in the last sentence of the appellate opinion. "The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self help, as defined here, and determine the right of the strikers to reinstatement accordingly." 416 F. 2d at 1107. This statement must be viewed in the context of the entire opinion. The primary emphasis of the Railway Labor Act is, as stated in the opinion, "the continuance of the employer's operations and the employer-employee relationship." *United Industrial Workers of the Seafarer's Int'l. Union of North America v. Board of Trustees of Galveston Wharves*, 5th Cir. 1968, 400 F. 2d 320, 329, 330. With this in mind the appellate court held that "the carrier's resort to self help was justified only to the extent necessary to restore service; its exercise was allowable only insofar as it served that end." 416 F. 2d at 1106. The Court then found that it was not necessary for the airline to discharge the strikers in order to hire a new work force and that the airline had exercised an impermissible form of self help in so doing. The court said that the airline should have replaced the strikers as it found new employees to do so. This court is charged in the opinion with determining when the strike would have ended had it not been for the illegal discharge. Once that time is established this court must then determine which strikers had been replaced at that time. Those strikers who had been replaced then would not be entitled to reinstatement.

On November 4, 1969, following issuance of the mandate, the Union filed a motion to reinstate the application for a preliminary injunction originally denied by this Court on January 24, 1969. This motion was accompanied by 937 substantially identical affidavits signed by discharged strikers stating that they would have returned work at

National on January 24, 1969.[1] The union also applied for relief on the mandate. Accordingly this court scheduled a series of conferences and hearings in order to receive evidence on the factual issues outlined above: The extent to which National exceeded the bounds of self help; the time at which the strike would have ended; and what strikers had been replaced at that time.

Through the commendable efforts of all counsel the great bulk of the evidence has been presented by stipulation. This exhibition of professionalism dramatically shortened the time required to try the factual issues.

In find as follows with regard to these issues.

The catalyst which initiated the strike was the January 17, 1969 suspension of three union members for their failure to carry out a work assignment. Although speculative; the evidence shows, and I find that, in the absence of the discharge, the strike would have ended on January 24 when the suspension expired. This conclusion presupposes that the strikers would have been willing to return with no guarantee concerning pay and other benefits lost during their 7 day absence. Dealing in the abstract I cannot find that this supposition is a fact however, it does seem reasonable.

As it happened, the strikers did not return on the 24th because they had been discharged. The three men who had been suspended did not return on the 24th either, as the Fifth Circuit erroneously assumed. 416 F. 2d at 1006, 1007. I do not find that this factual error affects this aspect of the case on remand. The purpose of the strike was to secure for the three men the right to work. This was accomplished by the expiration of the suspension. Whether the three men actually physically returned to work at that time would seem irrelevant to the conclusion of the strike.

Next to be determined is the question of which strikers had been replaced as of January 24, 1969. I find that on

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[1] [Footnotes appear at end of opinion.]

January 24 National had four men on its premises who had been hired to replace strikers. I further find that on that date National had approved and extended offers of employment to 63 replacements which had been accepted by the applicants. These 63 men were not, however, working for National on the 24th. The issue thus becomes whether an offer of employment to a new man constitutes replacement of a former employee. Do the 63 offers mean that 63 "positions were filled"? 416 F. 2d at 1007. I find that, in the circumstances, the offers did constitute replacement. The majority of the offers were made to men from outside the State of Florida who had to return home and prepare to move in order to begin work. The offers were consistent with the airline's efforts to maintain service. Once National made these offers it had a commitment to honor. It had accepted the applicants' offer to work in classic contract terms. Therefore, on January 24 I find that 67 strikers had been replaced by National.

There remains for determination the most significant issue, to what extent did National exceed the permissible bounds of self-help? The appellate court specifically held that the mass discharge of the illegal strikers was not permissible, "*under the circumstances.*" I find from the evidence adduced since the remand that these "*circumstances*" are not as the Fifth Circuit perceived.

In its opinion the appellate court quoted the Supreme Court as follows: "the justification for permitting the carrier to depart from the terms of the collective bargaining agreement lies in its duty to continue to serve the public." *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Exp. and Station Emp., A.F.L.-C.I.O.* v. *Florida East Coast Ry. Co.*, 384 U.S. at 247. This principle was elaborated upon by Judge Brown in *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, A.F.L.-C.I.O.*, 5th Cir. 1964, 336 F. 2d 172, 182. He again emphasized that a carrier's right to abrogate the status quo during a time of contract negotiation depends on the car-

rier's need to institute changes in order to continue operation. In the instant case of course contract negotiations were underway; Section 6 notices had been exchanged and both sides had an obligation to preserve the status quo. National's departure from the status quo by virtue of its mass discharge was made in an attempt to continue operations. Hindsight illustrates that this attempt was successful.

The reason for my decision that the strikers are not entitled to reinstatement lies in my finding from the undisputed evidence developed on the record, since remand, that in order to hire a new work force it was necessary for National to discharge all of the strikers. This evidence contradicts the language used by the Fifth Circuit in their opinion when they said "the discharge of the strikers was not necessary in order to hire a new labor force." This conclusion, upon which the court's later holding that "the mass discharge . . . exceeded the permissible bounds of employer self-help" is based, is not supported by the present record. It is now clear that in order to replace the illegally striking men National had to offer prospective employees seniority benefits and working conditions which would not be available if there was the prospect of a mixture of old and new men. National was hiring new men all over the United States. It is a fact that few of these men would have made the move to Miami without the guarantee of a solid seniority position and freedom from harassment by fellow workers.

The next question is then, was it necessary for National to hire a new work force "in order to make a meaningful reality of its right to continue to operate." *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, A.F.L.-C.I.O., supra,* 336 F. 2d at 182. The answer is obvious. Without men to service its airplanes the company would have been forced to shut down. With supervisory personnel carrying the load the airline had cancelled 36 flights by the 3rd day of the strike and would have been

forced to shut down within a very few days. The new men enabled the company to continue operations and within a month from that time 90% of the scheduled flights were operating. I recognize the appeal of the Fifth Circuit's statement that "the discharge of those best suited to carry on the carrier's business . . . would seem self defeating." However, it must be remembered that those "best suited" individuals refused to work. Considering the circumstances when they were discharged, National had no way to know when they would deign to return to work absent capitulation to their demands by the company. As this court abstractly found, the strikers would have most likely returned when the suspension of the three men was lifted. Can this court, or the appellate court, then say that the only way in which National could exercise its right and duty to operate an airline and serve the public in the face of an illegal strike was to satisfy the demands of the illegal strikers? This conclusion would be a perversion of the Railway Labor Act.

The emphasis of the Act is on an orderly, prescribed procedure. The airline (and the union)[2] followed this procedure and twice came before this Court in attempting to maintain operations. Twice this court declared the strike illegal, with the assent of the union leadership, and twice this court issued an injunction requiring the men to return to work. These injunctions were totally ignored. The seriousness with which the strikers took their responsibilities under the law is illustrated by the testimony of Messrs. Exum, Ober, Ballas and Brown before this court on December 3, 1969. There was no further procedure prescribed by the Railway Labor Act which the airline could have invoked. Here I find relevant the following portions of the oft quoted *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen, A.F.L.-C.I.O., supra* at 181:

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme

which deliberately denies the final power to compel arbitration. . . .

"Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 1957 353 U.S. 30, 40, 77 S.Ct. 635, 1 L. Ed. 2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

". . . But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate."

The Fifth Circuit noted the relevance of this FEC case in its opinion in this case and the analogy between the two is clear.

In conclusion, this Court has often been reminded that it sits as a court of equity while passing on the many requests for injunctions in this case. There are hundreds of wives and children of strikers caught up in this dispute to whom the word equity is non-existent. These persons are the victims of circumstances beyond their control. But the strikers were not such victims although some were permitted to believe that the three men had been fired rather than suspended. They chose their course—disregard for court orders, disregard for their job except under their conditions.[3]

The balancing of the equities is between these men and the airline. True, the mass discharge was swift but the

strike took place in the heart of the company's busiest time—the tourist season. The little noted words of a distinguished brother judge, the late Alexander Holtzoff, are compelling here. In issuing an injunction restraining an unlawful strike in a Railway Labor Act Case he said:

> Any employee who without lawful excuse fails to appear for work runs the risk of having such failure properly treated by his employer, either as a tender of resignation or as a ground for discharge. *In re Certain Carriers, Etc.*, 229 F. Supp. 259 at 261 (D.C. D.C., 1964).

If this principle is to be disregarded why are there laws defining the legality of strikes? If workers can strike at will no framework is needed. I hold that the principle is not to be disregarded and reiterate in accordance with the framework of the Railway Labor Act, that, faced with an illegal strike, National's departure from the terms of its collective bargaining agreement with the Union, to wit, the mass discharge was justified as it was reasonably necessary to allow the airline to assemble a new work force and thereby continue operation. Accordingly the Union's motion for an injunction requiring National to reinstate those strikers who have not returned to their jobs is Denied.

THIS 12th day of January, 1970.

s/ C. CLYDE ATKINS
United States District Judge

FOOTNOTES

1. The following is a simple affidavit:

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF DADE

BEFORE ME, the undersigned authority, personally appeared ....., who, after being first duly
(print name)
sworn, on oath, deposes and states as follows:

1. That prior to my discharge and/or termination by National Airlines, Inc., I was employed as a .....
....., at the hourly rate of $.....
(print job title)
My average weekly earnings for a six month period prior to my termination, including overtime pay, was approximately $.....

2. I was discharged and/or terminated on the ..... day of ....., 1969, and at that time I was working on the ..... shift. My Employee Number was.....

3. That on or about January 17, 1969, when the sit-down began, I did join my brothers in supporting the three brothers who were suspended in New York. After being ordered off the premises of National Airlines, I had been advised by the Union to return for work but my position was always the same and that was that I would only return to work when my three brothers in New York were returned to work.

4. On January 24, 1969 I was aware that the Union was asking Judge Atkins for a ruling to undo the discharges and/or terminations so that we could all go back to work, as my three brothers in New York had been finally notified by the Company to return back to work on that date. I

wanted to go back to work on that date and join them. I was denied this opportunity and have been denied this opportunity to this date.

FURTHER AFFIANT SAYETH NOT.

(JURAT OMITTED)

2. It will be remembered that this court found National violated the status quo by changing the airplane taxi crew complement and that appropriate injunctive relief was afforded the Union at their request. This injunction is honored to this day.

3. It must be noted that 226 strikers have voluntarily returned to their jobs at National as of this date.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29234

NATIONAL AIRLINES, INCORPORATED, *Plaintiff-Appellee*,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., *Defendants-Appellants*.

Appeal from the United States District Court for the Southern District of Florida

(July 15, 1970)

Before GODBOLD, DYER and MORGAN, *Circuit Judges*.

GODBOLD, Circuit Judge: This is the second appeal in a dispute arising from the mass discharge by National Airlines, Inc. of wildcat strikers while "freeze" provisions of the Railway Labor Act were in effect.[1] In the first appeal, taken by the union from the denial of a temporary injunction, *National Airlines, Inc.* v. *International Ass'n of M. & A.W.*, 416 F.2d 998 (5th Cir. 1969), this court held that National had exceeded the permissible bounds of self-help and remanded to the District Court. National's position in that appeal was that it could, without more, discharge employees engaged in a wildcat strike and thereby terminate their right to reinstatement. We pointed out that this failed to take into account the Railway Labor Act's explicit ban on self-help during the "freeze" period, but that self-help was not absolutely prohibited.

> . . . We therefore hold that the carrier's resort to self-help was justified only to the extent necessary to restore service; its exercise was allowable only in so far as it served that end.

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[1] 45 U.S.C. § 156.

> We do not think the mass discharge of the strikers in this case can be justified by the need to restore service. We recognize that the district court was faced with a difficult situation and had little time to deal with it. It is plain that the court's central concern was the restoration of the *status quo*. Nevertheless, we hold that the discharge of the strikers constituted an impermissible form of self help. The discharge of the strikers was not necessary in order to hire a new labor force.

416 F.2d at 1006.

Quite plainly, this court said that self help was allowable to the extent necessary to restore service but that restoration of service did not require the mass discharges. Thus, having rejected the outer limits for discharges urged by National, i.e., mass discharge of the strikers, we defined a narrow outer limit:

> . . . [R]eplacement of the strikers, but not discharge, would seem compatible with the need to restore service. It follows that those strikers whose positions were filled either at the time of the discharge or before the time the strike would have run its course are *not* entitled to reinstatement. On the other hand, strikers for whom no replacements had been found when the strike probably would have ended *are* entitled to reinstatement from the time they would have returned to work. This will require a factual determination on remand on the point in time when the strikers would have returned to work, e.g., the date of the three suspended employees in New York returned to work. The strikers, who are in a better position to cast light on this issue, should carry the burden to show when they would have returned to work in the absence of the discharge. Strikers who had not been replaced at that time, as revealed by company records, are entitled to reinstatement.

416 F.2d at 1007. In concluding, this court summarized its position in this way:

> . . . We further hold, however, that the mass discharge of the strikers exceeded the permissible bounds of employer self-help under the circumstances. National was entitled only to hire replacements for the strikers in order to operate its airline. The district court on remand should determine the precise extent to which the carrier exceeded the permissible bounds of self help, as defined here, and determine the right of the strikers to reinstatement accordingly.

416 F.2d at 1007. The permissible bounds of self-help was "as defined here," and we had defined it as not including mass discharges but limited to employing replacements to the time the strike would have ended.

On remand the District Judge considered the permissible limits of self-help to be an issue for him to determine *vel non*. He took evidence and found that National could not have hired a new labor force to continue operating if it had not discharged the strikers en masse. Since self-help was authorized to continue operating, he concluded that no strikers were entitled to reinstatement. He held that the conclusion of this court that the mass discharge exceeded the bounds of self-help was not supported on the record as developed on remand.

The District Judge erred in his conception of the mandate of the prior appeal by which he was, of course, bound. *In re United States*, 207 F.2d 567 (5th Cir. 1953). By his construction and the resultant fact finding, he reached a conclusion precisely contrary to the holdings of this court that self-help to continue service did not justify the mass discharge and that strikers were entitled to reinstatment unless replaced. The only matters for him to determine were when the strikers would have returned to work and who had been replaced as of that time, and to enter a direc-

tion that those not replaced be reinstated, and to adjudicate the differences, if any, over what reinstatement carried with it.

National urges that the decision of an appellate court in denying or granting a temporary injunction does no establish the law of the case, *United States v. United States Smelting R. & M. Co.*, 339 U.S. 186, 94 L.Ed. 750 (1950), especially when "evidence on a subsequent trial was substantially different" from that presented at the original trial. *White v. Martha*, 377 F.2d 428, 432 (5th Cir. 1967).

But "[t]he issues before the district court at the preliminary injunction stage may be such that its order, or if the order is reviewed, the appellate court's order is conclusive of the action." 7 Moore Federal Practice ¶ 65.21 at 1703 (2d ed. 1968); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 96 L.Ed. 1153 (1952). Here the illegality of mass discharge was presented on the motion for preliminary injunction and had been settled conclusively by the opinion of this court. The exception to law of the case where "evidence on a subsequent trial [is] substantially different" is inapplicable where by the prior appeal the issue is not left open for decision. *Paull v. Archer Daniels Midland Company*, 313 F.2d 612 (8th Cir. 1963); *Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir), *cert. denied*, 377 U.S. 934, 12 L.Ed. 2d 298 (1964).

We turn to the matter of relief. In the proceedings on remand the District Court held that in the absence of the discharge the strike would have ended on January 24 when the suspension expired. 308 F. Supp. at 181-82.

The strikers are not barred from reinstatement because they, arguably, failed to make an unconditional application for reinstatement. The decision for the District Court, as framed by this court on the prior appeal, was to establish the point in time at which the suspended employees in New York, whose suspension triggered the strike, would have

returned to work. That was to be the point at which it was assumed the discharged employees also would have returned to work had they been free to return rather than terminated. The matter for decision was, as the District Judge specifically recognized, an abstract one: not whether the discharged men unconditionally offered to come back to work on January 24, or conditioned their offer, or whether National unconditionally offered reinstatement, or offered less than that, but what it could reasonably be inferred would have happened if the suspensions of the New York employees had been removed as a cause of disaffection. This is not the National Labor Relations Act situation of the economic striker who unconditionally offers to return to work to protect his right to pay, or the employer who offers reinstatement which if not accepted may terminate the right to pay. We are concerned with the right of wrongfully discharged employees to a judicially directed reinstatement under the terms of this court's orders. The District Judge's finding fixing January 24 as the day on which the strike would have ended is supported by a mass of evidence.

However, we must remand the case for further findings because of uncertainties as to whether a small class of discharged employees had been replaced. The District Judge found that on January 24 National had on its premises four men who had been hired to replace strikers and that it hired 63 more on the 24th.[2] These findings raise two questions. What does "hired" mean, and when did National's right to "hire" replacements terminate?

The District Court considered that a replacement was hired and his predecessor's position filled when National

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[2] The union asserts that the 63 includes the four. This is a matter which can be clarified on remand.

In the lower court counsel for the union stated that he would accept the figure of 67 as the number of people "hired through the 24th." In context, the reference was to a number and not of the legal concept of who had been "hired".

had approved and extended an offer of employment to a new man and the applicant had accepted the offer. He noted that many of those in this category were applicants from outside the State of Florida who had to return home and prepare to move in order to begin work.

The word "hire" may be used in many different senses, representing a legal conclusion as well as a summary of a state of facts, *International Ass'n of Machinists* v. *International Air Service*, 302 F.2d 808 (4th Cir. 1962), and the word "replaced," in the factual circumstances of the present case, is also ambiguous. In cases of replacement of a striker the critical time is when the arrangement with the replacement worker becomes fixed and irrevocable. *International Ass'n of Machinists, supra.* Thus, if any employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is "hired" even though subsequently he may be divested of the job for failure to pass medical or security clearance. *Lodge 743, International Ass'n of Machinists* v. *United Aircraft Corp.*, 299 F. Supp. 877, 893 (D. Conn. 1969).

Also, we do not know if the District Court considered whether those persons he concluded were replacements because they had entered into employment contracts ever actually reported for work. *International Ass'n of Machinists* v. *International Air Service, supra,* was remanded in order that the District Court could inquire into what enforceable obligations had been created between company and replacements and whether the replacements had ever acquired payroll status. The necessity of actually coming on the payroll is especially significant in the particular context of the present case where the undergirding rationale is preservation of the status quo as provided by the Railway Labor Act, a status the prior appeal sought to restore as of the time the strike would have ended. It would be inconsistent with that concept to hold that a discharged employee could not be restored to status quo because a contract had been made to replace him, if in fact the replace-

ment never entered into the service of the company. In the run of the mill case of striker replacement the replacement is at work and the significance of a contract of employment is only to establish the time at which his employment commenced. In the present case, the formation of an employment contract with a replacement, which never ripens into actual employment, may not displace the statutory right of the discharged employee to return to the status quo.

The persons determined to be entitled to reinstatement must be reinstated with full benefits including back pay. *United Indus. Workers* v. *Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905, 23 L.Ed. 2d (1969); Cf. *Mungin* v. *Florida East Coast Railway Company*, 416 F.2d 1169, 1177 (5th Cir. 1969). The *Galveston* case describes both benefits and manner of calculation.

Apparently some discharged strikers were taken back before January 24, some of them pursuant to their specific requests, others as "new employees" without seniority. National urges that any such employee who has lost seniority, pay or other benefits, must grieve for his loss. National is in the peculiar position of urging that those who voluntarily came back to work are to be treated less well than those who did not. Resort to grievance procedures would only further fragment proceedings already difficult enough and would be inconsistent with the underpinning principle of restoration of the status quo. These employees are entitled to the same type of relief as those whose right to reinstatement is court-ordered.

Appellant claims that if a striker has been replaced and a vacancy he is qualified to fill has since arisen, he is entitled to be reinstated to that vacancy and to back pay and benefits from the time the vacancy arose. This issue was not determined on the prior appeal or by the District Court on remand and is for the District Court in the first instance.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 802

FRANK BUTCHER, ET AL.,
Petitioners,

vs.

FLORIDA INDUSTRIAL COMMISSION AND
NATIONAL AIRLINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, OF FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE

Petitioners' attempt to force this case into the mold of *Nash v. Florida Industrial Commission*, 389 U.S. 235, has caused several distortions. It is abundantly clear in the decisions below that the Petitioners were denied un-

employment compensation, not because of their exercise of federally guaranteed rights, but because of their voluntary continued participation in a classic labor dispute.

Petitioners in the first instance left work to engage in a wildcat strike which violated their collective bargaining agreement and the Railway Labor Act. They persisted in their illegal strike despite orders of their employer, their union, and two injunctions of a Federal District Court. (5a)[1] The Appeals Referee of the Florida Industrial Commission noted that: (6a)

> "It is the intent and desire of claimants to resume work for the employer if and when the dispute in which they are now engaged is settled (on the terms that are satisfactory to them). Although each received notice of termination, the employer has never ceased his efforts to prevail upon them to return to their jobs. The employer has been able to recruit some workers to fill positions vacated by claimants; however, none of these newly hired employees have received any assurance from the employer that their services will be utilized on a permanent basis. Since January 17, employment has been, and is now, available for claimants who wish to return to work for the employer. Claimants who did not comply with the employer demand that they report for duty, and who were allegedly terminated, have not been required to forfeit their major rights and privileges as employees of the employer. In that regard, the employer has publicly announced that if they returned they would be reemployed at the previously existing rate of pay and that all pension rights accumulated would be preserved; with respect to other rights (such as extended vacations) they would come in as new employees."

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1. References herein are to page numbers in Petitioners' appendix.

National did not condition its offer of employment on waiver of the right to contest the discharge action; i.e. the employees could *work* at their full rate of pay while prosecuting their grievance and/or judicial remedies, or while pursuing the same remedies they could *walk* a picket line and collect strike benefits. The referee further found: (12a)

> "The testimony will not support a finding that the employer completely severed the employer-employee relationship with claimants upon advising them they had been terminated. If it was the intention of the employer to permanently dispense with their services, he would not have continued his unceasing efforts to have them return, nor would he agree to pay them their previous salary and preserve their pension rights as a further inducement for them to return to his employ. Issuing letters of discharge and termination notices to striking employees is a tactic that is frequently resorted to by a struck employer as a show of strength. It is, however, meaningless unless the employer has permanantly replaced the striking workers and in so doing, removed from them the element of choice or volition as to whether they could have returned to work. Claimants obviously do not consider that they have been discharged as they plan to resume work for the employer when the labor dispute is settled to their satisfaction."

The opinion of the District Court of Appeals reflects consideration and rejection "as without merit" the Petitioners' contention that benefits were denied because they pursued their remedies under the Railway Labor Act. (17a-18a)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court has approved the denial of unemployment compensation when due to a labor dispute. *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 (1946). The reason ascribed by this Court to the legislative exclusion is "the broad policy of the legislation to compensate only persons involuntarily unemployed." *Ibid.*, fn. 13

2. Petitioners are really urging the Court to reverse the factual finding at all levels below that compensation was denied because of voluntary participation in a labor dispute; i.e. in spite of the classic symptoms of refusal to work at the proffered employment, picketing, and strike benefits the Commission *really* denied the compensation because the Petitioners were pursuing remedies under the Railway Labor Act. The findings of the Referee, the Industrial Commission, and the District Court of Appeal all rest on competent substantial evidence. This Court does not normally exercise its jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160.

3. The differences between *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, and the instant case are so many as to render *Nash* inappropriate:

(a) *Nash* had been laid off for lack of work and was awaiting only a call to return; Petitioners "elected to remain idle rather than work" (11a) despite repeated solicitations by National.

(b) The sole reason for denying *Nash* compensation was her filing of an unfair labor practice charge.

389 U.S. at 236. The pursuit of federally guaranteed remedies by Petitioners in this case was irrelevant to the denial of compensation.

(c) The dilemma noted by this Court in *Nash* (389 U.S. at 239) (keeping quiet and collecting compensation or filing an unfair labor practice charge and forfeiting compensation) did not exist in this case. The employees had the choice of (1) yielding to their employer's entreaties to return to work at full pay with pension benefits unimpaired, with the unqualified and unconditional right to continue to contest their disciplinary dismissal by grievance or court action, or (2) walk a picket line, withhold their services, and collect benefits from their Union. By what distorted logic can those who elected the latter course claim the right to their employer's financial support (through state unemployment compensation) while they try to destroy its business?

4. Petitioners suggest that withholding of benefits was interference with the free exercise of federal rights, *viz.* picketing, judicial review, and filing of grievances. The short answer is that the benefits would have been denied whether or not the remedies were exercised, so long as the employees continued "withholding their services from the employer in concert and refusing to work at a time when work was available for them [and] . . . further evidenced participation in the dispute by performing picket duty and related services designed to strengthen their position against the employer." (11a) Hence, the Appeals Referee made it very clear that the critical fact leading to denial of benefits was continued participation in the labor dispute. The referee's determination (essentially factual) is amply and adequately supported by the record.

5. This case is further inappropriate for exercise of discretionary jurisdiction because the labor dispute was at least in part a run-of-the-mill economic strike, arising from the union's effort to negotiate increased pay and other benefits. The Union's Vice President described the strike as follows (Tr. 230):

> "I must commend the courage and determination evidenced by our members in this situation and congratulate their *demonstration of absolute unity*. They deserve and are entitled to no less than the unified all-out support, both morally and financially, of our remaining 70,000 Air Transport members. Such an effort will *result in victory and strike a ringing blow for better contracts* not only in this round of negotiations but in all of those which inevitably lie ahead." (Emphasis added)

CONCLUSION

For the reasons stated this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 1970